# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1931

## No. 374

HARRY BLOCKBURGER, PETITIONER,

*vs.*

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 11, 1931

CERTIORARI GRANTED NOVEMBER 2, 1931

(36,188)

IN THE

# United States Circuit Court of Appeals
## For the Seventh Circuit

OCTOBER TERM, A. D. 1929.

No. 4389

HARRY BLOCKBURGER,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

*Counsel for Appellant:*
MR. HAROLD J. BANDY,

*Counsel for Appellee:*
MR. WALTER M. PROVINE,

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division.

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(36,188)

# SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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1 Pleas in the district court of the United States of America, within and for the Southern Division of the Southern District of Illinois, held at the City of Springfield, in said Division and District, before the Honorable Louis Fitz-Henry, Judge of said Court, on Monday, the third day of June, in the year of our Lord one thousand nine hundred and twenty-nine and of the Independence of the United States of America, the one hundred and fifty-third year. Placita

Attest:

S. T. BURNETT,
*Clerk.*

2 IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Illinois,

Southern Division.

The United States of America
*vs.*
Harry Blockburger, alias Harry Blackburger, alias Harry Lang and Margaret Walker.

No. 1479. Indictment. Vio. Harrison Narcotic Act and Narcotic Drugs Import and Export Act.

Be it remembered that heretofore, to wit: on the 10th day of June, in the year of our Lord, one thousand nine hundred twenty-nine, that being one of the days of the June Term, A. D. 1929, of the district court of the United States for the Southern Division of the Southern District of Illinois, the Grand Jurors of the United States of America, chosen, selected and sworn, within and for the Southern Division of the Southern District of Illinois, came into open court and presented an Indictment against one Harry Blockburger, alias Harry Blackburger, alias Harry Lang and one Margaret Walker, for "Violation of Harrison Narcotic Act and Narcotic Drugs Import and Export Act" which said Indictment was signed by the District Attorney and indorsed by the Foreman of said Grand Jury as a True Bill and was and is in the words and figures, following, to wit:

3 IN THE DISTRICT COURT OF THE UNITED STATES Filed 1929

For the Southern District of Illinois,

Southern Division.

At the June Term thereof, A. D. 1929.

United States of America,
*Plaintiff,*
*vs.*
Harry Blockburger, alias Harry Blackburger, alias Harry Lang, and Margaret Walker,
*Defendants.*
} Docket No. .....

Southern District of Illinois,
Southern Division. } ss.

The Grand Jurors of the United States of America, impaneled, sworn and charged in the District Court of the United States of America, within and for the said Southern Division of the Southern District aforesaid, at the term aforesaid, of the court aforesaid, in the year of our Lord Nineteen Hundred Twenty-nine, and inquiring for said Southern Division of said Southern District, upon their oath present that Harry Blockburger, alias Harry Blackburger, alias Harry Lang and Margaret Walker, on, to wit, the Twenty-seventh day of May, in the year of our Lord Nineteen Hundred Twenty-nine, at, to wit, the City of Springfield, in the County of Sangamon, in the State of Illinois, in the said Southern Division of the Southern District aforesaid and within the jurisdiction of this court, did then and there violate the Act of Congress, approved December 17, 1914, as amended, (commonly known as Harrison Narcotic Act), in that, they, the said Harry Blockburger, alias Harry Blackburger, alias Harry Lang and Margaret Walker, did then and there knowingly, wilfully, unlawfully and feloniously sell a certain quantity of a certain derivative of opium, to wit, two grains of morphine hydrochloride to one Ella Rush; which said two grains of morphine
3A hydrochloride was not then and there in the original stamped package and from the original stamped package;

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

WALTER M. PROVINE,
*United States Attorney.*

Second Count:

And the Grand Jurors aforesaid, inquiring as aforesaid, upon their oath aforesaid, do further present that Harry Blockburger, alias Harry Blackburger, alias Harry Lang and Margaret Walker, on, to wit, the Twenty-eighth day of May, in the year of our Lord Nineteen Hundred Twenty-nine, at, to wit, the City of Springfield, in the County of Sangamon, in the State of Illinois, in the said Southern Division of the Southern District aforesaid and within the jurisdiction of this court, did then and there violate the Act of Congress, approved December 17, 1914, as amended, (commonly known as Harrison Narcotic Act), in that, they, the said Harry Blockburger, alias Harry Blackburger, alias Harry Lang and Margaret Walker, did then and there knowingly, wilfully, unlawfully and feloniously sell a certain quantity of a certain derivative of opium, to wit, ten grains of morphine hydrochloride to one Ella Rush; which said ten grains of morphine hydrochloride was not then and there in the original stamped package and from the original stamped package; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

WALTER M. PROVINE,
*United States Attorney.*

Third Count:

And the Grand Jurors aforesaid, inquiring as aforesaid, upon their oath aforesaid, do further present that Harry Blockburger, alias Harry Blackburger, alias Harry Lang and Margaret Walker, on, to wit, the Twenty-ninth day of May, in the year of our Lord Nineteen Hundred Twenty-nine, at, to wit, the City of Springfield, in the County of Sangamon, in the State of Illinois, in the said Southern Division of the Southern District aforesaid, and within the jurisdiction of this court, did then and there violate the Act of Congress, approved December 17, 1914, as amended, (commonly known as Harrison Narcotic Act), in that, they, the said Harry Blockburger alias Harry Blackburger, alias Harry Lang and Margaret Walker, did then and there knowingly, wilfully, unlawfully

and feloniously sell a certain quantity of a certain derivative of opium, to wit, eight grains of morphine hydrochloride to one Ella Rush; which said eight grains of morphine hydrochloride was not then and there in the original stamped package and from the original stamped package; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

WALTER M. PROVINE,
*United States Attorney.*

Fourth Count:

And the Grand Jurors aforesaid, inquiring as aforesaid, upon their oath aforesaid, do further present that Harry Blockburger, alias Harry Blackburger, alias Harry Lang and Margaret Walker, on, to wit, the Thirty-first day of May, in the year of our Lord nineteen Hundred Twenty-nine, at, to wit, in the City of Springfield, in the County of Sangamon, in the State of Illinois, in the said Southern Division of the Southern District aforesaid and within the jurisdiction of this court, did then and there violate the Act of Congress of February 9, 1909, as amended, (commonly known as the Narcotic Drugs Import and Export Act), in that, they, the said Harry Blockburger, alias Harry Blackburger, alias Harry Lang and Margaret Walker, did then and there knowingly, wilfully, unlawfully, fraudulently and feloniously receive, conceal, buy, sell and facilitate the transportation, concealment and sale of a certain narcotic drug, to wit, a certain derivative of opium, to wit, twenty grains of morphine
4 hydrochloride; which said twenty grains of morphine hydrochloride had theretofore been fraudulently imported and brought into the United States of America contrary to law; they the said Harry Blockburger, alias Harry Blackburger, alias Harry Lang and Margaret Walker, at the time of so receiving, concealing, buying, selling and facilitating the transportation, concealment and sale of said twenty grains of morphine hydrochloride as aforesaid, at the City of Springfield aforesaid, then and there well-knowing the same to have been so fraudulently imported and brought into the United States of America contrary to law as aforesaid; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

WALTER M. PROVINE,
*United States Attorney.*

Fifth Count:

And the Grand Jurors aforesaid, inquiring as aforesaid, upon their oath aforesaid, do further present that Harry Blockburger, alias Harry Blackburger, alias Harry Lang and Margaret Walker, on, to wit, the Twenty-ninth day of May, in the year of our Lord Nineteen Hundred Twenty-nine, at, to wit, the City of Springfield, in the County of Sangamon, in the State of Illinois, in said Southern Division of the Southern District aforesaid and within the jurisdiction of this court, did then and there violate the Act of Congress, approved December 17, 1914, as amended, (commonly known as the Harrison Narcotic Act), in that, they, the said Harry Blockburger, alias Harry Blackburger, alias Harry Lang and Margaret Walker, did then and there knowingly, wilfully, unlawfully, fraudulently and feloniously sell, barter, exchange and give away to one Ella Rush a certain quantity of a certain derivative of opium, to wit, ten grains of morphine hydrochloride, which said ten grains of morphine hydrochloride was not then and there sold, bartered, exchanged and given away by them, the said Harry Blockburger, alias Harry Blackburger, alias Harry Lang and Margaret Walker, to the said Ella Rush, in pursuance of a written order of the said Ella Rush, to whom said ten grains of morphine hydrochloride
5 was so sold, bartered, exchanged and given away as aforesaid, upon a form theretofore issued in blank for that purpose by the Commissioner of Internal Revenue; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

WALTER M. PROVINE,
*United States Attorney.*

Endorsed: A True Bill, F. C. Hall, Foreman.

Endorsed: Filed in Open Court this 10th day of June, A. D. 1929. S. T. Burnett, Clerk.

Bail $5000.

FITZHENRY.

6 And afterwards, to wit: on the 20th day of June, A. D. 1929, the following further proceedings were had in said court in said case and were entered of record, to wit:

7 * * (Caption) * * Entered 1929.

Thursday, June 20, 1929.

Court met pursuant to adjournment.

Present, the Honorable Louis FitzHenry, Judge.

And now on this 20th day of June, A. D. 1929, comes the United States the plaintiff in this case by Walter M. Provine, Esq., United States Attorney for the Southern District of Illinois and comes also the defendant Harry Blockburger, alias Harry Blackburger, alias Harry Lang, in his own proper person and by Messrs. H. J. Bandy and F. O. R. Baker, his Attorneys, and the said defendant being arraigned on the Indictment herein for plea thereto says that he is not guilty as therein charged. The defendant by his attorneys moves the court to suppress the evidence herein.

The United States
*vs.*
Harry Blockburger, alias Harry Blackburger, alias Harry Lang and Margaret Walker.
} No. 1479. Indictment Vio. Harrison Narcotic Act, etc.

And now on this 20th day of June, A. D. 1929, comes the United States, the plaintiff in this case by Walter M. Provine, Esq., United States Attorney for the Southern District of Illinois, and comes also the defendant Harry Blockburger,
8 alias, etc., in his own proper person and by Messrs. H. J. Bandy and F. O. R. Baker, his attorneys and comes also the defendant Margaret Walker, in her own proper person, and the said defendants being arraigned on the indictment herein for plea thereto, each for himself says that he is not guilty as therein charged.

And afterwards, to wit: on the 28th day of June A. D. 1929, the following further proceedings were had in said court in said case and were entered of record, to wit:

9 * * (Caption) * *

Friday, June 28, 1929.

Court met pursuant to adjournment.

Present, the Honorable Louis FitzHenry, Judge.

And now on this 28th day of June, A. D. 1929, comes the United States, the plaintiff in this case by Walter M. Provine, Esq., United States Attorney for the Southern District of Illinois and come also the defendants Harry Blockburger, alias Harry Blackburger, alias Harry Lang and Margaret Walker, in their own proper persons and by Messrs. F. O. R. Baker and H. J. Bandy, their attorneys and the said defendant having each heretofore entered a plea of not guilty herein and issue now being joined, the following named jurors are tendered and accepted, to wit: Ralph Farrand, H. A. Smith, John W. Rogers, Jr., Roy E. Thompson, Chas. Turley, Harry McLean, Elmer O. Good, Glen Hartman, Jesse Boyd, H. McPherson, J. G. Delicate and Fred C. Boice, who are duly sworn to well and truly try the issues joined in this case and a true verdict render according to the law and the evidence and after hearing the evidence on behalf of the United States the United States Attorney says that he will no longer prosecute counts two, three, four and five of the Indictment herein as against the defendant Margaret Walker, whereupon, it is ordered by the court that said counts as to said defendant Margaret Walker, be, and they are each hereby dismissed, and after hearing the evidence on behalf of the defendants, the hour for adjournment having arrived, the further trial hereof is postponed until 9 o'clock A. M. tomorrow.

10 And afterwards, to wit: on the 29th day of June A. D. 1929, the following further proceedings were had in said court in said case and were entered of record, to wit:

11 * * (Caption) * * Verdict E June 29

Saturday, June 29, 1929.

Court met pursuant to adjournment,

Present: The Honorable Louis FitzHenry, Judge.

And now on this 29th day of June, A. D. 1929, comes again the United States, the plaintiff in this case by Walter M. Provine, Esq., United States Attorney for the Southern District of Illinois and come also the defendants Harry Blockburger, alias Harry Blackburger, alias Harry Lang and Margaret Walker, in their own proper persons and by Messrs. F. O. R. Baker and H. J. Bandy, their attorneys and comes also the jury impaneled and sworn herein and the further trial hereof is resumed. And after hearing the remainder of the evidence in the case, the arguments of counsel and the instructions of the court, the jury retired in charge of a sworn officer to consider a verdict, and afterwards comes into open court and for verdict says, "We, the Jury, find the defendant Harry Blockburger, alias Harry Blackburger, alias Harry Lang guilty on counts two-three-and five and ~~not~~ guilty on counts one and four and the defendant Margaret Walker, not guilty. Thereupon the said defendant Harry Blockburger, alias Harry Blackburger, alias Harry Lang, by his attorneys, then and there entered a motion for a new trial.

12 And afterwards, to wit: on the 20th day of July, A. D. 1929, the following further proceedings were had in said court in said case and were entered of record, to wit: Entered 1929.

13 * * (Caption) * *

Saturday, July 20, 1929,

Court met pursuant to adjournment

Present: The Honorable Louis FitzHenry, Judge.

And now on this 20th day of July, A. D. 1929, comes the United States the plaintiff in this case by Walter M. Provine, Esq., United States Attorney for the Southern District of Illi-

nois, and comes also the defendant Harry Blockburger, alias Harry Blackburger, alias Harry Lang, in his own proper person and by H. J. Bandy, Esq., his attorney and the court having heard the arguments of said attorneys on the motion of said defendant for a new trial and being thus fully advised in the premises, it is ordered that said motion be, and is hereby denied; thereupon the said defendant by his attorney entered a motion in arrest of judgment and the court having heard and duly considered the same, it is ordered that said motion be, and is hereby denied.

And the said defendant Harry Blockburger, alias Harry Blackburger, alias Harry Lang, now being arraigned at the bar of the court for sentence and having nothing further to say why sentence should not be pronounced against him—It is therefore considered and adjudged by the court that the said defendant Harry Blockburger, alias Harry Blackburger, alias Harry Lang, for the offenses by him committed in manner and form as charged in counts two, three and five of the indictment herein and as found by the jury in this case be confined in the United States Penitentiary, at Leavenworth,

Kansas, for a period of five years on each of said counts,

14 the said imprisonment on said counts to run consecutively and in the order of their number that is imprisonment under count three to follow imprisonment under count two and imprisonment under count five to follow imprisonment under count three; and that he pay a fine to the United States in the sum of two thousand dollars on each of said counts, making a total fine of six thousand dollars, together with the costs of this prosecution, amounting to the sum of 60 dollars, that execution issue therefor and that said defendant also stand committed in the said United States Penitentiary at Leavenworth, Kansas, until the amount of said fine and costs shall have been fully paid or until otherwise discharged by due process of law.

On motion of said defendant, is is ordered by the court that the said defendant have thirty days in which to prepare and file a bill of exceptions herein.

15 And afterwards, to wit: on the 16th day of May, A. D. 1930, there was filed in the office of the clerk of said court, a certain Bill of Exceptions (in narrative form) which said Bill of Exceptions is in the words and figures, as follows:

16 BILL OF EXCEPTIONS.

Bill of Exceptions filed May 16

Government's Evidence.

Record Page.

4 ELLA RUSH, testified as follows:

*Direct Examination.*

My name is Ella Rush. I live at Twentieth and Olive Street, St. Louis, Missouri.

5 I have known the defendant, Margaret Walker, since May 27th, 1929. I met her at 101 Adams Street, Springfield. I went down to her house and told her I was with a Carnival, and that I wanted some morphine. She said she didn't handle any of it herself, but she would see what she could do for me. I told her where I lived, and at about eight o'clock that night she told me to be ready at about eleven.

6 Mr. Bandy: We object on behalf of the defendant Blockburger, to any conversation out of his presence.

The Court: The objection will be sustained as to the defendant Blockburger and overruled as to the defendant Walker.

Witness (continuing): She came back about eleven o'clock and I walked down to Eighth and Washington and

7 met Mr. Blockburger. She made me acquainted with Mr. Blockburger, and I told him what I wanted. He said he didn't know whether he could get me any that night or not. I told him I didn't have any, and gave him Two Dollars. He went away and was gone from three to five minutes. Mrs. Walker and I went in a restaurant

17 and waited. He came back and the three of us went outside and stepped into a doorway where he gave me a cube of morphine. It was wrapped in a piece of paper. I told him I wanted some more, and he said, "Well, give me the money." I gave him Eight Dollars, and in about twenty minutes after two the next morning, he brought it to my room.

8 I gave Margaret Walker Ten Dollars in my room at the hotel. I was stopping at the Huskey Hotel in Springfield. After Mr. Blockburger gave me the cube of morphine, I saw him the next morning, which would be May 28th, at my room in the Huskey Hotel.

9 He brought me Eight Dollars' worth of morphine, which would be about ten grains. It was wrapped in paper. No money transferred at that time. Mr. Blockburger came to my room about eleven or eleven thirty on the 28th, and I gave him Ten Dollars to get me Ten Dollars' worth of morphine.

10 He said he did not like to bring it to the hotel, and that he would call me up. About two o'clock on the 29th, he called me and told me to be at the same restaurant at Eighth and Washington.

11 I went into the restaurant, and Mr. Peterson, a narcotic agent, came in and sat down at the table. I was sitting at the counter. Mr. Blockburger came in the back way, and sat down on the left hand side of me and handed me the package of morphine. He told me he would see me at the Carnival grounds. I went out, and Mr. Peterson followed me, and I handed him the package of morphine that I got from Mr. Blockburger.

12 18 I did not change the character of the contents of the package during the time I had it in my possession. The next day, which would be the 30th, Mr. Peterson and I met Mr. Blockburger and he told me that he couldn't let me have any stuff that evening, because someone had gone out of town for it and hadn't returned, that I should meet him at the Carnival grounds, and that if I could show him anyone that knew me and Mr. Peterson, everything would be all right and we could get all we wanted.

13 I told Mr. Blockburger that Mr. Peterson was my man.

14 I gave the cube of morphine, which I purchased on the first day, to Mr. Peterson, and I also gave the morphine which I purchased on the second and third occasions to him. Margaret Walker uses morphine. I have seen her take it.

*Cross-Examination.*

16 I worked for Mr. Peterson for about two months. He pays me three dollars a day. I have received that salary since March.

17 I am not in the service of the United States. I am an addict. I have never been arrested or convicted.

When I came to Springfield I didn't work at the Carnival. I lied when I told Mrs. Walker that I was working there. When I told her I wanted morphine for my own use, I was misrepresenting the facts.

I came to Springfield for the purpose of helping Mr. Peterson. When I told Mrs. Walker that he was my man, I lied. Mr. Peterson and I both came to help Mr. Howard.

He gave me some names and told me to see them. I gave Mrs. Walker Ten Dollars to make me acquainted with someone I could buy morphine from. That was about eleven o'clock on the night of May 27th.

Mr. Peterson was trailing me when I met Mr. Blockburger.

Mr. Howard gave me the money and told me to buy morphine. He told me to go see Blockburger and see if he would sell. I gave Blockburger Ten Dollars on the 28th. I don't know where Peterson was when this transaction took place.

I did not use any of the morphine that I got in these cases. I used my own.

*Redirect Examination.*

I did not on any of the occasions about which I testified, give Mr. Blockburger a written order for the morphine or any part of it which I obtained from him. The packages containing morphine that I received from Mr. Blockburger did not have revenue stamps on them. I gave them to Mr. Peterson in the same condition as they were when I received them from Mr. Blockburger.

*Recross Examination.*

I have taken morphine today. I told Mrs. Walker that my husband was a pickpocket travelling with the Carnival. That wasn't true.

BERNARD PETERSON testified as follows:

32 My name is Bernard Peterson. I live in East St. Louis. I have been a narcotic agent employed by the Government for six years.

33 I have known Ella Rush since May, 1929. I brought her to Springfield with me on May 25th. No one else came with us.

34 The first time I saw Harry Blockburger, he was coming through the rear door of a restaurant near Eighth and Washington. That was on the 29th of May, 1929. I was sitting at a table in the restaurant. I saw Ella Rush there also. We followed her from Fifth Street to the restaurant.

35 She went in and sat down at the counter. I was in the back part seated at a table. Mr. Blockburger came through the back door and sat down on a stool, near her, and handed her a package. They talked a while, but I did not hear what was said. She got up and walked out—I followed her for a minute or two, and then went west on Eighth Street. She handed me the package she had in her hand.

36 I took a part of that package and made a sample of it. It was sent in a sealed envelope and mailed to the chemist in Chicago. I did not change the character of the substance in any way. There were no revenue stamps on the package. There was about ten grains in it. I

37 turned the remainder of it over to Mr. Howard.

38 21 At about twelve o'clock on the night of May 27th, Ella Rush came to the Empire Hotel where I was stopping, and gave me a cube of morphine. It was wrapped in a newspaper.

39 I saw a Government's exhibit 3 on May 29th, 1929. I obtained it from Ella Rush. The substance contained in the envelope is the same as it was when I received it.

40 Government's exhibit 1 was handed to me at the Empire Hotel, by Ella Rush, on the night of May 27th, or the morning of May 28th, 1929. During the time that I had the exhibit, I made no changes in the contents.

41 I gave samples of it to Mr. Howard. There were no revenue stamps on the package, when Ella Rush handed it to me. It was wrapped in paper. Exhibits 1 and 2 are in the same paper that they were when they were

handed to me. Neither of them were in stamped packages. Government's Exhibit 2 was handed to me by Ella Rush on May 28th, 1929. It had no revenue stamps on the package. It is in the same condition as it was when I received it.

43 I put Exhibits 1, 2 and 3 in envelopes and marked them. I put the wrappings in the envelopes with the
44 morphine. The large envelope, which is Government's Exhibit 4, was delivered to Mr. Howard, and was taken by him to his office in Peoria. He gave it to me in the court room just now. I saw Mr. Blockburger in Springfield on the 30th day of May. He was with Ella Rush.
45. 22 Ella Rush introduced Mr. Blockburger to me. She introduced me as her man. She called him "Mr. Lang." She asked him when she could get some more
46 morphine. Mr. Blockburger said that he could not find that she had ever been at the Carnival, and asked me if I knew anybody out there, and I said "sure." He asked me if I knew Stephens. I had never heard of him, but I said "yes" anyhow. He said, "Meet me out there at eight o'clock tomorrow evening, "and if you can show me that anybody knows you, I will sell you all the morphine you want." He said, "You might be Government men. They have five or six counts against me now. I will do anything once, but I'm not going to take any chances."

Mr. Bandy: Did he say that three or four times, as you state?

Mr. Alexander: We object to cross-examination.

Mr. Bandy: I want to know what the conversation was.

The Court: You may examine him about that on cross-examination.

To which ruling of the Court the defendant excepted.

47 I told him I would meet him there the next night, and show him I was all right. I never saw him after that.

*Cross-Examination.*

I am a narcotic agent. I permit myself to be introduced as a pickpocket. I was not a pickpocket. I was
48 not her man. When I said that I was her man, I wasn't. Probably nothing that I said to Blockburger at that

time was true. I am telling the truth now. When
49 23 I said that I was not a pickpocket, I was telling the truth.

*Redirect Examination.*

During the month of May, 1929, I paid Ella Rush Three Dollars a day. I charged this to my expense account.

50 *Recross Examination.*

I charged the amount I paid her to expenses for an informer.

51 FRED SMITH testified as follows:

My name is Fred Smith. I live in Chicago, Illinois. I was in Springfield for a period of six weeks, beginning with May 27th, 1929. I was an informer for the Government.

52 I saw the defendant Blockburger on the night of the 27th of May, 1929, at Eighth and Washington Streets. He was with Ella Rush and Mrs. Walker.

53 They went into a restaurant, remained there a few minutes, and he came out alone. He was gone about five minutes, and then came back. All three of them went out of this restaurant, stepped into a doorway, and I saw him hand her a package. Ella Rush left after that, and went to her room.

*Cross-Examination.*

I followed Ella Rush from the Huskey Hotel that night. I have been a government informer for three years. I work for Agent Belco. I am not appointed by the Government.

54 I use morphine.

55 I have never been arrested for it. I have had
24 morphine today. I am here trying to make cases against people. I get paid for doing that.

56 GEORGE HOWARD testified as follows:

My name is George Howard. I live at Peoria, Illinois, and I am a narcotic agent employed by the United States Government. I have acted in that capacity for five years. I am acquainted with the defendant, Margaret Walker. I know the defendant Harry Blockburger. I saw him at the police station in 1929. The next time I met him was on the night of May 31st, 1929, when he was arrested.

59 Mr. Bandy: We are not going to attack the analysis which was made of the substance marked "Government's Exhibits 1, 2, 3 and 4."

Mr. Alexander: Well, we will offer the three exhibits, 1, 2 and 3.

Mr. Bandy: You may state what it is, if you want to.

60 JOHN R. MATCHETT testified as follows:

My name is John R. Matchett; I live at LaGrange, Illinois. I am a chemist for the Bureau of Prohibition, with post duty at Chicago. I have examined Government's exhibits 5, 6 and 7. They came to my office through the mail on June 7th, 1929.

61 The character of the contents of the substance is morphine hydrochloride.

25 Mr. Bandy: We will admit that the three samples examined by the witness are the same three samples that Mr. Peterson and Mr. Howard testified that they mailed to the witness for examination.

The Court: This is admitted.

62 We offer EXHIBITS 5, 6 and 7 in evidence.

Mr. Bandy: No objection.

The Court: Consider them admitted.

Mr. Alexander: Government rests.

63 Mr. Bandy: Defendant, Harry Blockburger, asks the Court to dismiss the fourth count, being a count which charges the violation of the Act of Congress of February 9, 1909, on the 31st day of May, 1929, because of the total absence of proof to support that count.

The Court: Motion denied.

To which ruling of the court the defendant then and there excepted.

65 Mr. Bandy: The defendant Blockburger again urges the motion for an election.

The Court: Election denied.

26 To which action of the Court the defendant then and there excepted.

Mr. Bandy: And at the conclusion of the Government's case, the defendants jointly and severally, asked the Court to dismiss the case as to all counts against them.

The Court: Motion denied.

To which ruling of the Court the defendants then and there excepted.

## DEFENDANTS' EVIDENCE.

66 MARGARET WALKER testified as follows:

My name is Margaret Walker. I live at Springfield, Illinois. I am married and have two children. Ella Rush came to my house on Sunday afternoon of May
67 26th, 1929, and represented herself as Mrs. Mason. She said her husband knew my husband very well. She said that she heard about my husband being in trouble, and asked me if I couldn't get him out. I said, "It takes a little money," and she said, "I will take up a collection at the Carnival for you." She told me to come back Sunday, and that she would give me some money. I did, and she gave me ten dollars.

68 My husband was in jail at the time. She told me to come back Monday night, and she would have more. I just saw her on the two occasions. Nothing was said there in either of those conversations about drugs.

69 27 She asked me if I knew Harry Cline or a Harry Lang. I told her that I knew Harry Lang. She came to my house many times, and she wanted to know
71 how much it would cost to get my husband out. I said that I would have to see a bondsman, that lives on Washington and Eighth Street. She and I started there, and we ran across Harry Lang. I introduced Mr. Lang to her. She said that her husband was acquainted with

him; we went to a restaurant and while I was paying the check, she and Harry went outside.

72 There was nothing said in any conversation about morphine. I did not see Mr. Blockburger hand her any package.

73 I did not see where Mr. Blockburger went after we left the restaurant. That was on Monday night, the 27th. I saw this lady the next day, which was Tuesday. I did not see Harry Lang or Harry Blockburger give her Two Dollars while we were at the restaurant.

74 She came to my place about ten o'clock on Tuesday, May 27th, and said for the first time, that she was an addict, that she was very sick and wanted to know if I could get her something. She said, "I talked to this Harry Lang, and he claims he can get something for me." She never saw me take any morphine. I have never had any around my place.

76 *Cross-Examination.*

I have been an addict for about five years. I have known Mr. Blockburger for about a year. I knew him as Mr. Lang, but I do not know what business he was engaged in.

77 28 I know Mr. Howard and Mr. Walker. I talked to Mr. Howard in the hall of this building a few days ago.

82 Q. Didn't you say to me, "I would like to be a Government witness, but I will have to know what the Government will do to me before I testify."

Mr. Bandy: That is objected to, because it carries an inference without any proof, and because it is in the nature of a compromise.

The Court: She may answer.

To which ruling the defendant then and there excepted.

Witness (continuing): I never mentioned anything about being a Government witness. I know George Blockburger, the brother of the defendant, Harry Blockburger.

84 I had a conversation with Mr. Dilly this morning, in the presence of Mr. Howard. Mr. Blockburger's name wasn't mentioned to Mr. Dilly.

Q. I will ask you if you didn't tell Mr. Dilly that Mr. George Blockburger, the brother of Harry Blockburger, the defendant in this case, had asked you to take the stand and testify, that you had delivered morphine to Ella Rush, and if you didn't say that you told Mr. Blockburger you would not do that.

A. Mr. Blockburger's name wasn't mentioned to Mr. Dilly.

Mr. Bandy: We object to the question and answer, and ask that it be stricken and the jury instructed to disregard it.

29 The Court: This is the conversation that is supposed to have been had, and she answered the question that she never said that to Mr. Dillie or that in substance.

94 HARRY BLOCKBURGER, testified as follows:

*Direct Examination.*

My name is Harry Blockburger. I live at Springfield. I have lived here about nine years. I am selling women's ready-to-wear clothing. I have been in that business, off and on, for twenty years. I met Ella Rush about
95 eleven o'clock on Monday evening, May 27th. Mrs. Walker was with her at the time. Mrs. Walker told me that she was going to see Mr. Dudley about a bond for her husband. She said that Mrs. Mason, here, said that her husband knew me from St. Louis. We all went in the restaurant and drank some coffee. We talked about the Carnival and about Mrs. Walker's husband being in trouble. There was nothing said there about
96 morphine. I did not secure a cube of morphine on that night or any other night, and take it to her room at the Huskey Hotel. After coming out of the restaurant, I did not step into a stairway in the presence of Mrs. Mason and Mrs. Walker and hand a package of any kind to Mrs. Mason.

97 I did not receive any Two Dollar bill from Mrs. Mason, or from Mrs. Rush, who was the same person. I saw Mrs. Mason about nine o'clock in the morning on Tues-
98 day, May 28th. She knocked on my door—I opened it

and she stepped in. She said she was a user of mor-
30 phine, and wanted to know if I could get her an ounce, that she would be willing to pay Seventy-five Dollars for an ounce of morphine. I told her that I did not know anything about it, and didn't know where I could get it. She said she would be back to see me or come out to the grounds some time and that I should let her know if I found anybody that had any morphine for sale. I saw her again on Wednesday afternoon, May
99 29th, at the O & F Restaurant on Washington Street. I went in the restaurant to get away from her—didn't want to have anything to do with her. I went behind the stairs so that she could not see me. She came in, saw me, and wanted to know if I knew any place she could get an ounce of morphine.

100 There was a waitress, another man that I know, myself and this woman in the restaurant at this time. I did not see Mr. Peterson there. He was not in the restaurant. I did not hand Mrs. Mason a package of any kind there. I did not have any morphine to hand her.
101 That evening about ten thirty, I was walking on the west side of the square, and I saw her and Mr. Peterson. I tried to avoid her; she saw me and followed me to the square corner. By that time I was in front of the Illinois National Bank. She got me by the sleeve and asked me if I didn't hear her calling me. She said she wanted me to meet her man. About that time, Mr. Peterson came up. She wanted to know if I had found out where she could get some morphine. She introduced me to Mr. Peterson and they said they were from the South, and that around Louisville he could get all the morphine
31 he wanted. I told him that that would be a good place to go, because I didn't know any place where
102 he could get it. I did not say to them that if they could show me someone that they knew with the show, I could get them all the morphine they wanted. On Tuesday night I had been out to the Carnival and Mr. Stephens told me that Ella Rush was not with the show. I told them that they weren't with the show and that they were trying to get me in trouble. She said, "I'll tell you the truth." "We are not with the show. My husband is a-
103 pickpocket." Peterson admitted that he was a pickpocket. I told them I didn't want to be bothered with them any more. That was on May 29th, about ten thirty

in the evening. I met officers Jess Bourg and Williams on May 29th, at about two o'clock in the afternoon. I told them that this woman was trying to get me in trouble, and asked them why Howard would be sending
104 to me to buy morphine. These men are city detectives. That was before I was arrested on this charge. I complained to you (F. O. R. Baker) on Tuesday. She did not give me Eight Dollars on Tuesday the 28th, to purchase morphine. She never gave me any money to purchase morphine. She did not give me Ten Dollars the next day to buy morphine for her. On no occasion did I ever receive any money from her, nor did I give her any morphine. She never asked me to purchase morphine by the cube, pill or paper.
106 She never wanted to buy it any other way except by the ounce.

32 *Cross-Examination:*

I buy job lots of womens' ready-to-wear, dresses, hosiery and underwear, and sell them.
107 The last lot that I bought was shortly after the second of March; I disposed of it in Springfield. I don't know all the people that I sold it to, but I can name some. I sold Mrs. Liggins some on the 15th of March.
110 I can make a hundred percent, or better, on these sales. I bought a lot of goods about six weeks before the last one.
111 There are about twelve dozen pairs of hose to a lot. I was away about three weeks during the month of March.
112 I went to Cincinnati to purchase some goods from Schwartz and Cohn. I spent all of February in Springfield.
114 I have no other employment aside from what I have mentioned. I spend a great deal of time on the streets in Springfield. I am not personally acquainted with Henry Walker. I know John Smith, alias "Cookie" Smith.
115 Q. Do you know a man named William Bapple?
A. Yes.
Mr. Baker: I object, as improper cross-examination.
The Court: Let him answer.
To which action of the Court the defendant then and there excepted.

Witness: Yes, sir, I do.

33 Witness (continuing): I know Edward Lewis, sometimes known as "Clarke."

I am personally acquainted with Bapple. I have merely a casual acquaintance with the others.

116 I know John Mahoney, sometimes called "Speck". I know him to speak to. I don't think I have talked to him over a half a dozen times in six or seven years. I know Lloyd Hemstrett.

Q. When is the last time you talked to "Speck" Mahoney?

Mr. Bandy: That is objected to as being immaterial and not cross-examination.

The Court: I don't see the materiality of it but he may answer.

To which ruling of the court the defendant then and there excepted.

A. I don't know. I talked to him out there the other day in the court room. I don't remember just what day it was.

I know John Smith more than casually. I met him in
117 the restaurant and different places around town. I never associated with him.

Q. Now I will ask you if these men Henry Walker, John Smith, alias "Cookie" Smith, Edward Lewis, alias "Clarke", John Mahoney, known as "Speck" and Lloyd Hemstrett are not all known to you to be morphine addicts?

Mr. Bandy: We object, because it is immaterial, prejudicial and not cross-examination.

The Court: He may answer.

To which ruling of the court the defendant then and there excepted.

118 A. Well, I have heard of some of those fellows, I have heard about Hemstrett. In fact if you go out to a ball game they call him a dope head and everything like that, but to know that he actually uses it, I don't know, I have never seen him use any dope.

34 Mr. Alexander: How about the others?

Witness (continuing): I have never heard of Mahoney using dope, I heard that "Clarke" was a dope fiend, but I don't know it to be a fact. I went out to this show and inquired about the woman on Tuesday evening May 28th. I talked to Mr. Stephens the man-

ager of the concession and Mr. Miller, the owner of the show. I told them her name was Mason. They told
119 me they did not know her and that she wasn't with the carnival. I met her and "her man" in the restaurant the next afternoon. I told her that I did not know where she could get an ounce of morphine. She asked me if I
120 could get it or tell her where she could get it. The next time I met her and "her man" was Wednesday evening about 10:30. I told her that I had made inquiries and found that she was not with the carnival. It was on
121 this occasion that she told me "her man" was a pickpocket.

Q. Mr. Blockburger, I will ask you if you are not the same Harry Blockburger who is sentenced to the Missouri State Penitentiary and started to serve your sentence on March 6th, 1913, the sentence being for four years for the crime of burglary and larceny.

Mr. Bandy: That is objected to because it is prejudicial and improper and is not the proper way to prove the alleged fact that is contained in the question.

The Court: He may answer.

To which ruling of the court the defendants then and there excepted.

A. Yes, sir. That is true, February 18, 1913.

122 I met Mr. Jessberg and Mr. Williams at 2:30 in the afternoon of May 30, 1929.

*Redirect Examination.*

I started to serve my sentence and had about forty days of the sentence to serve when they offered me a pardon because of this man's confession. I don't re-
35 member the man's name that confessed he died in a St. Louis or East St. Louis hospital. I refused the
123 pardon at that time. I said that inasmuch as I had served that much time I would do it all, but after I had served three-fourths of my time Governor Gardner granted me a pardon and restored me to citizenship.

*Recross Examination.*

I was pardoned and had my citizenship restored in 1916 or 1917.

The confession which caused my release was made either in St. Louis or East St. Louis. I was in the penitentiary at the time and don't know just which place its was made.

Whereupon court adjourned until 9:00 A. M. Saturday, June 29, 1929.

## GOVERNMENT'S EVIDENCE IN REBUTTAL.

GEORGE HOWARD, testified as follows:

*Direct Examination.*

I am the same George Howard that testified before in this case. I have been about the Court Room and in the lobby to the court room during the past three or four days. I had a conversation with Mrs. Margaret Walker during the last three or four days.

Q. Did she approach you or did you approach her?

A. She approached me.

Mr. Bandy: We object to that question and answer and ask that it be stricken.

The Court: He may answer.

To which ruling of the court the defendant then and there excepted.

Mrs. Walker came to me and said that she would like to be a Government witness in this case and that before becoming a Government witness she would want to know what the Government would do for her. I told her that she would have to talk to the United States Attorney about that. She said that she would like for me to arrange for her to talk to the United States Attorney. I was present in the office of the United States Attorney when Margaret Walker and Mr. Bille had a conversation. Mr. Peterson wasn't there.

Q. I will ask you whether or not Margaret Walker on that occasion said in your presence this or this in substance, that George Blockburger, a brother of the defendant Harry Blockburger, had asked her, Margaret Walker, to take the witness stand in the trial of this case and testify that she made the sales of morphine that were charged in this case.

A. She did.

130 Mr. Bandy: We object to that question because the testimony of this witness develops a different situation than that included in the impeaching question, the impeaching question having been, did you in the presence of Mr. Howard and Mr. Peterson say to Mr. Dillie. The witness now states that Mr. Peterson was not present.

The Court: The question and answer are important things. Objection overruled.

To which ruling of the court the defendant then and there excepted.

I was present in the United States Attorney's office
131 yesterday when Mrs. Walker and Mr. Peterson were there. Margaret Walker said that she would like to be a government witness. She said that all she had to do with this case was to get $10.00 from Ella Rush for introducing her to Harry Lang.

*Cross-Examination.*

132 Mrs. Walker did not say that she wasn't guilty.

BERNARD PETERSON, testified as follows:

*Direct Examination.*

133 I am the same Mr. Peterson that testified before in this case. I was present in the office of the United States Attorney yesterday at the time Margaret Walker was present. She said that she would like to testify for
37 the Government in this case but that she would want to know what would be done to her before she testified. She said all she had to do with the case was to get $10.00 from Ella Rush for introducing her to Harry Lang.

*Cross-Examination.*

134 I never heard her say that she wasn't guilty.

## DEFENDANT'S EVIDENCE IN REBUTTAL.

135 GEORGE BLOCKBURGER, testified as follows:

*Direct Examination.*

My name is George Blockburger. I live at Granite City, Illinois. I am a real estate broker. I am a brother of the defendant, Harry Blockburger. I was present in the court room yesterday when Mrs. Walker testified.
135 I never requested Margaret Walker to go on the witness stand and testify that she made the sale or sales in this case and that Harry Blockburger didn't. I never talked to her at any time about this case.

*Cross-Examination.*

136 I live in Granite City. I sign a few bonds. I am on the bond of Mrs. Walker.
137 Q. Are you on the bond of a man named Bapple, who is charged with the violation of the narcotic law in this court?

Mr. Bandy: We object as being wholly immaterially and not proper cross-examination.

The Court: Let him answer.

To which ruling of the court the defendant then and there objected.

A. Yes, sir, I am on the bond of Mr. Bapple.

Mr. Bandy: We further object because of the prejudicial quality of this question. Yesterday Mr. Blockburger was asked whether he knew William Bapple and now the District Attorney injects into the evidence the fact that William Bapple is under indictment for a violation of the same act under which the defendant Harry Blockburger is being tried.

140 38 The Court: Objection overruled.

To which ruling of the court the defendant then and there excepted.

A. Yes, sir.

Mr. Bandy: The defendant asks that the answer be stricken and the jury instructed to disregard it, because it is immaterial, irrelevant and not applicable to the issues in this case.

The Court: Motion denied.

This Was All of the Evidence Introduced in This Cause on Behalf of the Government and the Defendant.

141 Mr. Bandy: And now at the conclusion of the whole case, the defendant, Harry Blockburger asks the court to instruct the jury to find him not guilty on each and every count of the indictment.

The Court: Motion denied.

To which ruling of the court the defendant then and there excepted.

During the course of the closing argument of Mr. Alexander the following transpired in the presence and hearing of the jury:

I am an officer of the Government and the Court is an officer of the Government, and we know Ella Rush.

Mr. Bandy: The defendants object to the statement that Ella Rush is known to this Court, and we ask that the jury be instructed to disregard that statement.

The Court: The jury is instructed to disregard the statement, except that the Court has seen her here and has seen the circumstances under which she comes here.

Mr. Bandy: It wasn't limited to that.

Mr. Alexander: That is just what I means.

* * * * * *

142 39 Mr. Alexander: Most of these narcotic addicts are pickpockets, or a great many of them; we will admit that.

Mr. Bandy: We object to that.

The Court: Well, that may be stricken and disregarded.

Mr. Alexander: If I said anything improper as to that I withdraw it; I didn't mean to say anything of that kind.

Mr. Bandy: I take it nobody is on trial for being a pickpocket.

The Court: Nobody is on trial here for being a pickpocket. Proceed.

* * * * * *

Mr. Alexander: He made deliveries of morphine to her—

Mr. Baker: I submit that is wrong. We denied specifically that we went up to make a delivery of medicine.

Mr. Alexander: Well, he delivered morphine; he admits that he went to her hotel room.

Mr. Baker: But he denied it emphatically.

The Court: I don't recall it; let the jury decide.

Mr. Alexander: As I recall it, Mr. Blockburger in one statement said he went to the hotel room of this woman. I may be worng, but I think that is right.

* * * * * * *

Mr. Alexander: Here is a pickpocket, and he wasn't
142 shocked at that; that is the kind of people that they associated with.

Mr. Bandy: That is objected to; it is an intimation those are the people the defendant associated with. If the Court please, he says that is the kind of people these men associated with.

Mr. Alexander: I think it is a fair inference.

14[illegible]40 The Court: The jury will understand that this is Mr. Alexander's conclusion from the evidence.

* * * * * * *

Mr. Alexander: He met these people on the street at night and learned he was a pickpocket, and he promptly went to the police and reported it.

Mr. Baker: I object to that; Ella Rush swears that he sold to her the next day.

The Court: What?

Mr. Baker: We object to that, Your Honor. After the night at the carnival she testified and swore that he sold to her on the 29th.

Mr. Alexander: I asked him very particularly when he talked to the police, and it was on Thursday,—that was his answer, and I submit that he answered that on Thursday he went to the police.

Mr. Baker: He went to the carnival on the night of Tuesday and found out she was lying to him.

The Court: Let the Jury decide that.

41 COURT'S INSTRUCTIONS.

144 The Court: Gentlemen of the Jury, the Court will not attempt to read the statute of the United States to you with reference to the handling of narcotics, but I will say this to you: that if the defendants have done the things with which they are charged in this indictment in manner and form as charged, they have violated the law.

The first count of this indictment charges the defendants with selling two grains of morphine hydrochloride to one Ella Rush on the 27th day of May 1929, and charging that the morphine in question was not then and there in the original stamped package or sold from the original stamped package.

In regulating the lawful handling of narcotics the law requires that any sale that is made must be made from a stamped package, that is, a package stamped with the revenue stamp showing that the Government has collected the revenue upon that package.

The second count charges that a sale was made under the same unlawful circumstances to Ella Rush on the 28th day of May, 1929, and that the morphine hydrochloride was not then and there in the original stamped package and from the original stamped package.

145 The third count is a similar charge, charging that the sale was made on the 29th day of May, 1929, in the City of Springfield, etc., and the amount was eight grains, about eight grains of morphine hydrochloride to Ella Rush, and that it was sold not from an original stamped package.

The fourth count charges that the defendants wilfully and unlawfully did receive, conceal, buy, sell and facilitate the transportation and concealment and sale of certain narcotic drugs, to-wit, a certain derivative of opium,
42 to-wit, twenty grains of morphine hydrochloride, which said twenty grains of morphine hydrochloride had theretofore been fraudulently imported into the United States contrary to law; that the said Harry Blockburger, alias, etc., and Margaret Walker, at the time of so receiving, buying and facilitating the transportation and concealment, and sale of said twenty grains of morphine hydrochloride, as aforesaid, at the City of Springfield, aforesaid, then and there well knew the same to have been fraudulently imported and brought into the United States.

Where the possession is established, the law presumes that they knew; but the presumption, of course, may be rebutted by the defendants. But unless it is rebutted, the presumption controls.

146 The fifth count charges a sale to Ella Rush of ten grains of morphine hydrochloride on the 29th day of May.

Mr. Alexander: I think that is without giving a written order, Your Honor.

The Court: Yes; without having a written order. That is another requirement of the law, that any person who sells or buys must present a written order which is furnished by the Collector of Internal Revenue. So that is the fifth count.

Now, as you are aware, the Government has nollied the second, third, fourth and fifth counts as to the defendant, Margaret Walker, so that she is on trial as to the first count only. All of the counts stand so far as the defendant Blockburger is concerned. So that the Court will say to you, as a matter of law, that if the defendants have done the things in manner and form as charged in this indictment, they have violated the law.

43 To this indictment the defendants have heretofore entered their several pleas of not guilty. The effect of that plea is to cast the burden upon the Government to prove that the defendants are guilty in manner and form as charged beyond a reasonable doubt. If the Government sustains that burden, and you should so find from
147 the evidence admitted for your consideration, then you would be warranted in finding the defendants guilty. If the Government has not sustained that burden, then it would be your duty to find the defendants or either of them or both of them as the case may be, not guilty.

Gentlemen of the Jury, you will begin the consideration of this case by giving the defendants and each of them the benefit of the presumption of innocence. They are presumed to be innocent throughout the trial, and that presumption is to find effect in a verdict of not guilty unless you find from the evidence that the Government has sustained the burden of proof and proved that the defendants are guilty in manner and form as charged, beyond a reasonable doubt. Then proof to that extent overcomes the presumption of innocence.

Gentlemen of the jury, while it is your duty to take the law as the Court gives it to you as applicable to this case, you are the sole judges of the facts. You are the judges of the credibility of the several witnesses who have testified before you and you are the judges of the weight of the testimony admitted for your consideration. In determining the degree of credibility that you will accord to any witness who has testified before you, you have a

149 right to take into consideration the manner of the witness while testifying, the reasonableness or the unreasonableness, if any, of his story, the truthfulness, if any, of the witness who has testified before you, the opportunities the witness may have had for learning the facts con-
44 cerning which he has testified, and the interest or lack of interest of the witness in the final determination of the case. And then by applying these tests you say for yourselves just what degree of credibility you will accord to a witness and just what weight you will give to his testimony, and make up your verdict accordingly.

Each of these defendants has seen fit to go upon the witness stand and testify in his own behalf. It was their legal right to do so, and it is your duty in determining the degree of credibility that you will accord to them as witnesses for themselves to apply to them the same tests that you apply to any other witness who has testified before you, bearing in mind of course, that the defendants are materially interested in the final determination of this case.

You have heard much in this charge and throughout the trial concerning the presumption of innocence and reason-
149 able doubt. I think the presumption of innocence has been explained to you. Reasonable doubt, Gentlemen of the Jury, means just such a doubt as the expression itself describes, a reasonable doubt, based upon the evidence or lack of evidence in the case,—such a doubt as would cause an ordinarily prudent person to hesitate or pause in the transaction of the grave affairs of life, such as affairs connected with one's business of with one's family. If you have such a doubt as to the guilt of these defendants or either of them, then it is your duty to give them the benefit of that doubt.

On the other hand, a reasonable doubt is not a device that has been concocted to allow guilty men to escape; it does not mean the possibility of a doubt, nor the probability of a doubt, nor a mere speculative doubt; but it means a real, substantial doubt, based upon the evidence or lack of evidence in the case.

45 Gentlemen of the Jury, there is a sharp conflict in the testimony here as to the sales. On one side there is a statement that the purchase was made and on the other side there is a denial that the purchase was made. Therefore you are instructed that if you believe from the

evidence that any witness has wilfully sworn falsely to any fact material to the issues in this case, then you have
150 a right to entirely disregard the testimony of such witness except insofar as it is corroborated by other credible witnesses whom you do believe or by facts and circumstances shown upon the trial.

I told you that you are the judges of the credibility of the witnesses and of the weight of the evidence. The defendant Blockburger saw fit to go upon the witness stand in his own behalf. You were entitled to know who he was. On cross-examination the Government proved by him that he had heretofore been convicted of a felony and had been an inmate of the Missouri State Penitentiary. That evidence was permitted to be submitted to the jury as a fact concerning that witness in order that you might consider it in connection with his credibility as a witness, and that is the only purpose for which it was admitted.

There was a rule at one time that one who had been convicted of a felony was an incompetent witness. That is not the rule now, but he is a competent witness and the jury has a right to take the fact of a former conviction into consideration in determining the degree of credibility they will accord to him as a witness, and, if you believe him, to act upon his testimony.

Gentlemen of the Jury, when you retire to your Jury room you will be permitted to take with you the indictment
151 in this case. The indictment is permitted to go to the jury for one purpose and for one purpose only; and that is that you may accurately inform yourselves as to the exact nature and character of the several charges which are laid against these defendants,—that is, the de-
46 fendant Blockburger and one charge that is made against the defendant Walker. The indictment is not evidence and will not be considered as evidence by you; it is the naked charge, the mere written allegation upon which the issues of fact are raised which you are to try.

Is there any suggestion on behalf of the Government?

Mr. Alexander: I think of no suggestions, Your Honor.

The Court: Are there any suggestions on behalf of the defendants, or either of them?

Mr. Bandy: Merely, cour Honor, to enlarge upon Your Honor's definition of the indictment, by advising the jury that in addition to being the naked frame of the issue, that it is the accusation that imposes upon the prosecu-

tion of the burden of provits its contents beyond a reasonable doubt.

The Court: I thought I made that clear, Mr. Bandy.

Mr. Bandy: Well, possibly so. I just wondered if they understood it was an accusation from the use of the
152 words "that it is the naked charge" or the use of the word "allegation".

The Court: I think the jury is well advised that the indictment is the written accusation, every material allegation of which is put in issue by the plea of not guilty.

Mr. Bandy: No further suggestions.

The Court: No further suggestions?

Mr. Baker: Yes, sir; I would like to have the Court instruct the jury that if they read in the Springfield morning paper or any other periodical anything concerning this case, that they should not allow themselves to be influenced by that in any degree.

47 The Court: The jury will consider itself so instructed. If any of you have read anything in any newspaper concerning this trial, absolutely disregard it, because these defendants must be tried upon the evidence admitted here for your consideration regardless of any reporter's views or anybody else's, or anything else.

Mr. Baker: And that the number of witnesses does not determine the weight of the evidence.

The Court: The jury is so instructed. Are there any exceptions to the charge as given, on behalf of the Government?

Mr. Alexander: No, your Honor.

The Court: Are there any exceptions on behalf of the
153 defendants, or either of them?

Mr. Bandy: The defendants except to the statement contained in that part of the charge referring to the testimony brought out in cross-examination of the defendant Harry Blockburger that he had been convicted and confined in the penitentiary, that there was once a rule of law that one who had been convicted of a felony was an incompetent witness, the application being that that in an unreasonable way and inferentially disparages his testimony at this time, that limitation against his testimony having been removed by statute, and we except to it.

The Court: The jury will disregard the reference in the charge to the law as it formerly stood with reference to the incompetency of a witness convicted of a felony.

Mr. Bandy: That is the only exception.
The Court: Anything else?
Mr. Bandy: That is all.
Mr. Baker: No, sir.
The Court: Gentlemen of the Jury, as to the form of your verdict, if you find both of these defendants guilty, you will say "We, the jury, find the defendants",
48 writing in their names, "guilty"; sign your verdict and return it into court.
154 Now, I will say to the jury that a verdict of guilty as to both in a general verdict will be construed by the Court to be a verdict that the defendant Walker is guilty on the first count only, but to save you writing that in,—that is the only count against her here,—a general verdict of guilty will be considered a general verdict on all five counts as to Blockburger.

If you find both of the defendants not guilty you will say: "We, the jury, find the defendants" naming them "not guilty". Sign your verdict and return it into court. If you find one of the defendants guilty and the other defendant not guilty you will say by your verdict: "We, the jury, find the defendant", writing in the name, "guilty; and the defendant" writing in the other name, "not guilty". If you should find the defendant Blockburger guilty on some count or counts and not guilty on the other count or counts, you will say so by your verdict in a form which I am going to submit to you. If you should find the defendant Walker guilty I think you better write that into this form, and then if you should find the defendant Blockburger guilty on some count or counts and not guilty on other count or counts, you can write that in, so that it will be clear and so that the Court will understand just what you find.

I am giving you these forms for your assistance, not
155 for your direction. Whatever verdict you arrive at must be your verdict, and the verdict that you return must show just what you find.

49 IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Illinois

Southern Division.

United States of America,
*Plaintiff,*
*vs.*
Harry Blockburger,
*Defendant.*
No. 1386.

MOTION FOR NEW TRIAL.

Now comes Harry Blockburger, the above named defendant, by F. O. R. Baker and H. J. Bandy, his attorneys, and respectfully asks the Court to set aside the verdict heretofore rendered in this cause and to grant a new trial therein. As reasons in support of this motion the defendant sets forth the following:

1. The verdict is contrary to the law.
2. The verdict is contrary to the evidence.
3. The evidence does not establish the guilt of the defendant beyond a reasonable doubt.
4. The Court erred in instructing the jury that there was once a rule in law that one who had been convicted of a felony is an incompetent witness in his own behalf.

50 5. The Court erred in permitting the prosecution to show, in the cross examination of the defendant, that he had once been convicted of a felony and incarcerated in the Missouri State Penitentiary. This was not the proper way in which to make such a showing, and it resulted to the prejudice of this defendant.

6. The Court erred in permitting testimony, over the objection of this defendant, concerning statements alleged to have been made by defendant, Margaret Walker, to various narcotic agents, to the effect that she was willing to turn Government witness if the Government would be easy with her, and that she was willing to testify against this defendant; also, testimony to the effect that the defendant, Margaret Walker, stated to narcotic agents that a brother of this defendant, to-wit, George Blockburger, had requested her to testify that she made the sales, in order that this defendant might escape punishment. This testimony was in-

admissible against this defendant, was not binding upon him, but was very prejudicial to his rights. Although it was alleged conversation of the defendant, Margaret Walker, it did not concern her, and concerned only this defendant, in whose presence it was not made.

7. The Court erred in permitting the prosecution, in the cross examination of witness George Blockburger, to
51 ask him if he had not signed the bond of William Bapple, who is under indictment, charged with violating the Harrison Narcotic Law. The defendant had already been asked in cross examination, over objection, whether he was not acquainted with, and did not associate with, William Bapple. The question asked of the witness, George Blockburger, was harmful, improper and prejudicial, because it tended to embarrass and degrade the witness, and to lessen the effect of his testimony, but it was doubly prejudicial, when considered in connection with the improper question asked the defendant in cross examination, concerning his association with William Bapple, because it introduced the said William Bapple to the jury as one charged with the identical offense for which this defendant was being tried.

8. The Court erred in permitting the prosecution over the objections of this defendant, to ask the defendant, in cross examination, if he did not know and associate with William Bapple, with one Walker, and with one Hemstreet, known as "Lion Tamer", and if he did not know them as drug addicts. This testimony was incompetent, irrelevant, immaterial, met no issue raised by the pleadings, but had the effect of prejudicing and embarrassing the defendant with the jury.

52 9. The defendant was unduly and improperly prejudiced by certain remarks of the District Attorney in his closing argument, especially the statement that the Court was acquainted with Ella Rush, principal witness for the prosecution, and also the statement that most persons engaged in the sale of narcotics and most drug addicts are pick pockets, and that this accounts for the fact that the defendant did not report to the police that narcotic agent Peterson had been introduced to him as a pickpocket.

10. The testimony of Ella Rush in unworthy of belief.

11. And for other good and sufficient reasons.

BAKER.
H. J. BANDY,
*Attorneys for Defendant.*

(But the Court, having duly considered said motion for new Trial, denied the same, and entered judgment upon the verdict. To which ruling of the Court and entry of Judgment, the defendant, by his counsel, then and there excepted.)

53 * * (Caption) * *

MOTION TO VACATE OR MODIFY JUDGMENT.

Now comes Harry Blockburger, the above named defendant, by F. O. R. Baker and H. J. Bandy, his attorneys, and respectfully asks this Honorable Court to vacate or modify the judgment heretofore entered in this cause, and as reasons in support of this motion, the defendant alleges the following:

1. That the sentence imposed is unreasonable and excessive.

2. That the sentence imposed should not exceed a fine of two thousand dollars ($2,000.00) and a sentence of five (5) years in the penitentiary, this being the maximum provided by law.

3. That the sentence imposed is in excess of that provided by law.

F. O. R. Baker
H. J. Bandy
*Attorneys for Defendant.*

54 But the court having duly considered said motion to vacate and modify judgment, denied the same; to which ruling of the court, the defendant, by his counsel, then and there duly excepted.

And Now, in furtherance of justice and that right may be done, and forasmuch as the matters and things herein set forth do not otherwise appear of record, the defendant tenders and persents the foregoing as his bill of exceptions in the above entitled cause and prays that the same may be allowed, settled and signed and sealed by the court and that the same be made a part of the record, which is accordingly allowed and approved and the same ordered to be filed and made a part of the record in this cause.

Given under the hand and seal of the Judge of said court

before whom said proceedings were had on this 16th day of May, A. D. 1930.

LOUIS FITZHENRY,
*Judge of the District Court of the United States for the Southern District of Illinois, Southern Division.*

Approved:
WALTER M. PROVINE,
*United States Attorney.*

*Attorneys for the Defendants.*

Filed May 16, 1930 S. T. Burnett, Clerk.

55 And afterwards, to wit: on the 19th day of August A. D. 1929, the following further proceedings were had in said court in said case and were entered of record, to wit: Entered 19, 192

56 * * (Caption) * *

ORDER FOR EXTENSION OF TIME IN WHICH TO FILE BILL OF EXCEPTIONS.

It is hereby ordered that Harry Blockburger, the above named defendant, may have thirty (30) additional days, from the 19th day of August, A. D. 1929, or until the 18th day of September, A. D. 1929, in which to file his bill of exceptions in the above entitled cause.

Dated this 18th day of August, A. D. 1929.,

LOUIS FITZHENRY,
*Judge of the United States District Court for the Southern District of Illinois.*

Endorsed: Filed Aug. 19, 1929, S. T. Burnett, Clerk.

(Endorsed) #1479 In the District Court of the United States for the Southern District of Illinois Southern Division United States of America, Plaintiff, vs. Harry Blockburger, Defendant. Filed Aug. 19 1929 at ..... o'clock ..... M. S. T. Burnett, Clerk Docket #..... Order for Extension of Time in Which to File Bill of Exceptions. H. J. Bandy, Attorney for Defendant.

Sept. 1929. 57 And afterwards, to wit: on the 17th day of September A. D. 1929, the following further proceedings were had in said court in said case and were entered of record, to wit:

58 • • (Caption) • •

ORDER FOR EXTENSION OF TIME IN WHICH TO FILE BILL OF EXCEPTIONS.

It is hereby ordered that Harry Blockburger, the above named defendant, shall have an extension of thirty (30) additional days in which to file his bill of exceptions in the above entitled cause with the clerk of this court, and it is further ordered that said bill of exceptions must be filed on or before October 17th, A. D. 1929.

Dated this 17 day of September, A. D. 1929.

LOUIS FITZHENRY
*Judge of the United States District Court of the Southern District of Illinois.*

Endorsed: Filed Sept. 17, 1929, S. T. Burnett, Clerk.

Oct. 17. 58½ And afterwards, to wit: on the 17th day of October A. D. 1929, the following further proceedings were had in said court in said case and were entered of record, to wit:

59 • • (Caption) • •

ORDER EXTENDING TIME IN WHICH TO PREPARE AND FILE BILL OF EXCEPTIONS.

Comes now the defendant in the above entitled case by H. J. Bandy, Esq., his attorney and on his motion, it is ordered by the court that the time for preparing and filing the bill of exceptions herein by said defendant, be, and the same is hereby extended for a period of thirty days from and after October 17th, A. D. 1929, to and including November 16th, A. D. 1929.

Dated this 17th day of October, A. D. 1929.

Enter

FITZHENRY
*U. S. District Judge.*

Endorsed: Filed Oct. 17, 1929, S. T. Burnett, Clerk.

60 And afterwards, to wit: on the 19th day of October A. D. 1929, the following further proceedings were had in said court in said case and were entered of record, to wit: Entered 1929.

61 * * (Caption) * *

Saturday, October 19, 1929.

Court met pursuant to Adjournment.

Present, the Honorable Louis FitzHenry, Judge.

And now on this 19th day of October, A. D. 1929, comes the United States, the plaintiff in this case by Walter M. Provine, Esq., United States Attorney for the Southern District of Illinois and comes also the defendant Harry Blockburger, by H. J. Bandy, Esq., his attorney and the court having heard the arguments of said attorneys on the motion of the said defendant to vacate or to modify the judgment and sentence of the court heretofore pronounced herein and being now fully advised in the premises, it is ordered that said motion be, and is hereby denied, to which ruling of the court the defendant then and there by his attorney duly excepted.

It is further ordered by the court that the said defendant have thirty days in which to prepare and file his bill of exceptions herein.

61½ And afterwards, to wit: on the 19th day of October, A. D. 1929, there was field in the office of the clerk of said court, a certain notice of appeal together with petition for appeal and assignment of errors, which said notice of appeal, petition for appeal and assignment of errors are in the words and figures, following, to wit: Filed O 1929.

62 * * (Caption) * *

NOTICE TO UNITED STATES ATTORNEY OF APPLICATION FOR APPEAL.

To Honorable Walter Provine, United States Attorney for the Southern District of Illinois:—

Please take notice that on Saturday morning, October 19th, A. D. 1929, at the hour of ten o'clock, or as soon thereafter

as same may be heard, application will be made to the Honorable Louis FitzHenry, Judge of the United States Court for the Southern District of Illinois, for an appeal from the judgment of this Court in the above entitled case to the United States Circuit Court of Appeals, for the Seventh Judicial Circuit.

This defendant attaches hereto a copy of the assignment of errors, which will be filed with the said application for appeal, and presented to the Court:

HARRY BLOCKBURGER,
*Defendant.*
By H. J. BANDY,
*Attorney for Defendant.*

Copy of foregoing notice, together with copy of assignment of Errors received this 19th day of October, A. D. 1929.

WALTER M. PROVINE,
*U. S. Attorney.*

63 * * (Caption) * *

H. J. BANDY, first being duly sworn, on his oath states that he is the attorney for the above named defendant, Harry Blockburger.

Affiant further states that on this 18th day of October, A. D. 1929, he mailed a notice of application for the appeal of the above entitled case, together with a copy of the assignment of erorrs, to Honorable Walter Provine, United States Attorney for the Southern District of Illinois, to the office of said Mr. Provine, at Springfield, Illinois.

H. J. BANDY.

Subscribed and sworn to before me this 18th day of October, A. D. 1929.

.....
*Notary Public.*

Endorsed: Filed Oct. 19, 1929, S. T. Burnett, Clerk.

64 * * (Caption) * *

## PRAYER FOR APPEAL.

Now comes Harry Blockburger, the above named defendant, by H. J. Bandy, his attorney, and respectfully prays this Honorable Court to allow an appeal from the judgment in the above entitled cause to the United States Circuit Court of Appeals for the Seventh Judicial Circuit. The said defendant attaches hereto his assignment of errors, together with the affidavit of H. J. Bandy, attorney for defendant, that a copy of said assignment of errors and a notice of this application for appeal have been mailed to Honorable Walter Provine, United States Attorney for the Southern District of Illinois, at Springfield, Illinois.

HARRY BLOCKBURGER
*Defendant.*
By: H. J. BANDY
*Attorney for Defendant.*

Endorsed: Filed Oct. 19, 1929, S. T. Burnett, Clerk.

65 * * (Caption) * *

## ASSIGNMENT OF ERRORS.

And now comes the defendant, Harry Blockburger, by H. J. Bandy, his attorney, and says that there is manifest error in the record and proceedings in this case, in this:—

1. The Court erred in imposing an excessive and unreasonable punishment.
2. The Court erred in instructing the jury that there was once a rule of law that one who had been convicted of a felony is an incompetent witness in his own behalf.
3. The Court erred in permitting the prosecution to show, in the cross-examination of the defendant, that he had once been convicted of a felony and incarcerated in the Missouri State Penitentiary.
4. The Court erred in permitting testimony, over the objection of this defendant, concerning statements alleged to have been made by co-defendant, Margaret Walker, who was found not guilty, to various United States narcotic agents,

to the effect that she was willing to turn Government witness, if the Government would be easy with her, and that she
66 was willing to testify against this defendant; also, in admitting testimony, over the objection of the defendant, to the effect that the co-defendant, Margaret Walker, stated to narcotic agents that a brother of this defendant, to-wit, George Blockburger, had requested her to testify that she made the sales of narcotics, in order that this defendant might escape punishment.

5. The Court erred in permitting the prosecution, in the cross examination of witness George Blockburger, to prejudice the said witness with the jury, by asking him if he had not signed the bond of William Bapple, who is under indictment in this Court, charged with violating the Harrison Narcotic Law.

6. The Court erred in permitting the prosecution, over the objections of this defendant, to ask the defendant, in cross examination, if he did not know and associate with William Bapple, with one Walker, and with one Hemstreet, known as "Lion Tamer."

7. The defendant was unduly and improperly prejudiced by certain remarks of the United States Attorney, in his closing argument, especially the statement that the Court was acquainted with Ella Rush, principal witness for the prosecution, and also the statement that most persons engaged in the sale of narcotics, and most drug addicts, are pickpockets.

8. The Court erred in denying defendant's request for a directed verdict of not guilty, or an instruction directing the jury to find the defendant not guilty, made at the close of the Government's case, and renewed at the close of all of the evidence in the case.

HARRY BLOCKBURGER
*Defendant.*
By H. J. BANDY
*Attorney for Defendant.*

Filed Oct. 19, 1929 S. T. Burnett, Clerk.

(Endorsed) No 1479. United States of America, —vs— Harry Blockburger, alias, etc. Assignment of Errors. Filed Oct. 19, 1929. S. T. Burnett, Clerk.

67 And afterwards, to wit: on the 19th day of October A. D. 1929, the following further proceedings were had in said court in said case and were entered of record, to wit: Entered O 1929.

68 * * (Caption) * *

APPEAL ORDER.

And now comes Harry Blockburger, the defendant in the above entitled cause, and prays an appeal from the judgment of the District Court of the United States for the Southern District of Illinois, in the case of United States vs. Harry Blockburger, wherein the said Blockburger was charged, in an indictment, and impleaded with a co-defendant, whose name is Margaret Walker, with having violated various provisions of the act of Congress, approved December 17th, A. D. 1914, as amended, commonly known as the Harrison Narcotic Act, and also the violation of the act of Congress of February 9th, A. D. 1909, as amended, commonly known as the Narcotic Drugs Import and Export Act, and the said Harry Blockburger now files his assignment of errors, which is hereto attached, together with the affidavit of H. J. Bandy, his attorney, showing that a copy of said assignment of errors and a notice that this application for appeal will be made by Harry Blockburger, has been mailed to Honorable Walter Provine, United States Attorney for the Southern District of Illinois.

And upon consideration of such application for appeal,
69 it is ordered and adjudged by the Court that an appeal be allowed to the said defendant, Harry Blockburger, the said appeal to be to the United States Circuit Court of Appeals for the Seventh Judicial Circuit.

Dated this 19th day of October, A. D. 1929.

LOUIS FITZHENRY
*Judge of the United States Court for the Southern District of Illinois.*

Endorsed: Filed Oct. 19, 1929, S. T. Burnett, Clerk.

(Endorsed) In the District Court of the United States for the Southern District of Illinois Southern Division. United States of America, Plaintiff, vs. Harry Blockburger, Defendant. (Copy) H. J. Bandy, Attorney for Defendant.

Nov. 19. 70 And afterwards, to wit: on the 19th day of November A. D. 1929, the following further proceedings were had in said court, in said case and were entered of record, to wit:

71 * * (Caption) * * *

INDICTMENT.

This cause coming on this day to be heard upon the motion of the defendant herein for additional time within which to prepare and file his Bill of Exceptions herein and it appearing to the Court that said defendant has been unable to present same to the court for approval, it is ordered that the time for preparing and filing the said Bill of Exceptions be, and the same is hereby extended for a period of thirty days from and after this date, to and including December 18, 1929.

Dated this 18 day of November, A. D. 1929.

Enter

FITZHENRY
*U. S. District Judge.*

Endorsed: Filed Nov. 19, 1929, S. T. Burnett, Clerk.

Nov. 19. 72 And afterwards, to wit: on the 19th day of November A. D. 1929, the following further proceedings were had in said court, in said case and were entered of record, to wit:

73 * * (Caption) * * *

INDICTMENT.

This cause coming on this day to be heard upon the motion of the defendant herein for an enlargement of the time within which to file the transcript of record herein in the United States Circuit Court of Appeals for the Seventh Circuit and for the docketing of said cause in said court and for good cause shown, it is ordered by the court that the time for filing said transcript of record and docketing said cause in the said United States Circuit Court of Appeals for the Seventh Circuit be, and the same is hereby extended for

a period of thirty days from and after this date, to and including December 18, 1929.

Dated this 18th day of November, A. D. 1929.

Enter

FITZHENRY
*U. S. District Judge.*

Endorsed: Filed Nov. 19, 1929, S. T. Burnett, Clerk.

Entered 1929.

And afterwards, to wit: on the 18th day of December A. D. 1929, the following further proceedings were had in said court, in said case and were entered of record, to wit:

74 * * (Caption) * *

INDICTMENT.

This cause coming on this day to be heard upon the motion of the defendant herein for additioal time within which to prepare and filed his bill of Exceptions herein, and it appearing to the Court that said defendant has been unable to present same to the Court for approval, it is ordered that the time for preparing and filing the said Bill of Exceptions be, and the same is hereby extended for a period of thirty days from and after this date, to and including January 17, 1930.

Enter:

FITZHENRY
*U. S. District Judge.*

Dated this 18th day of December, A. D. 1929.

Endorsed: Filed Dec. 18, 1929, S. T. Burnett, Clerk.

75 And afterwards, to wit: on the 18th day of December A. D. 1929, the following further proceedings were had in said court, in said case and were entered of record, to wit:

Dec. 18, 76 * * (Caption) * *

INDICTMENT.

This cause coming on this day to be heard upon the motion of the defendant herein for an enlargement of the time within which to file the transcript of record herein in the United States Circuit Court of Appeals for the Seventh Circuit and for the docketing of said cause in said court, and for good cause shown, it is ordered by the Court that the time for filing said transcript of record and docketing said cause in the said United States Circuit Court of Appeals for the Seventh Circuit be, and the same is hereby extended for a period of thirty days from and after this date, to and including January 17, 1930.

Enter:

FITZHENRY
*U. S. District Judge.*

Dated this 18th day of December, A. D. 1929.

Endorsed: Filed Dec. 18, 1929, S. T. Burnett, Clerk.

13. 77 And afterwards, to wit: on the 13th day of January A. D. 1930, the following further proceedings were had in said court in said case and were entered of record, to wit:

78 * * (Caption) * *

MOTION FOR EXTENSION OF TIME.

Now comes Harry Blockburger, the above named defendant, by H. J. Bandy, his attorney, and respectfully asks this Honorable Court to enter an order extending the time for preparing and filing his bill of exceptions herein, and for filing the transcript of record and docketing said cause in the United States Circuit Court of Appeals for the Seventh Circuit, for a period of thirty days from January 17th, A. D. 1930, which would be to and including February 16th, A. D. 1930.

H. J. BANDY
*Attorney for Appellant.*

79 * * (Caption) * * Entered J 1930.

## ORDER FOR EXTENSION OF TIME.

And now, on this 13th day of January, A. D. 1930, comes the above named defendant, by H. J. Bandy, his attorney, and on his motion it is ordered by the Court that the time for preparing and filing his bill of exceptions herein, and for filing the transcript of record and docketing said cause in the United States Circuit Court of Appeals for the Seventh Circuit be, and they are each hereby extended for a period of thirty days from the 17th day of January, A. D. 1930, to and including February 16th, A. D. 1930.

FITZHENRY
*United States Judge.*

Endorsed: Filed Jany. 13, 1930, S. T. Burnett, Clerk.

(Endorsed:) In the District Court of the United States for the Southern District of Illinois Southern Division United States of America, Appellee, *v.* Harry Blockburger, Appellant. Motion and order for Extension of time. H. J. Bandy, Attorney for Appellant.

80 And afterwards, to wit: on the 15th day of February A. D. 1930, the following further proceedings were had in said court in said case and were entered of record, to wit: Filed Fe 1930.

81 * * (Caption) * *

## MOTION FOR EXTENSION OF TIME.

Now comes Harry Blockburger, the above named defendant, by H. J. Bandy, his attorney, and respectfully asks this Honorable Court to enter an order extending the time for preparing and filing his bill of exceptions herein, and for filing the transcript of record, and docketing said cause in the United States Circuit Court of Appeals for the Seventh Circuit, for a period of ten days from the 16th day of February, A. D. 1930, or to and including February 26th, A. D. 1930.

H. J. BANDY
*Attorney for Appellant.*

Feb. 15, 82 * * (Caption) * *

## ORDER FOR EXTENSION OF TIME.

And now, on this 15th day of February, A. D. 1930, comes the above named defendant, by H. J. Bandy, his attorney, and on his motion, it is ordered by the Court that the time for preparing and filing his bill of exceptions herein, and for filing the transcript of record and docketing said cause in the United States Circuit Court of Appeals for the Seventh Circuit be, and they are each hereby extended for a period of ten days from the 16th day of February, A. D. 1930, to and including the 26th day of February, A. D. 1930.

2/15/30

FITZHENRY
*United States Judge.*

Endorsed: Filed Feby. 15, 1930. S. T. Burnett Clerk.

b. 26, 83 And afterwards, to wit: on the 26th day of February A. D. 1930, the following further proceedings were had in said court in said case and were entered of record, to wit:

84 * * (Caption) * *

## MOTION FOR EXTENSION OF TIME.

Now comes Harry Blockburger, the above named defendant by Harold J. Bandy, his attorney, and respectfully asks this honorable court to grant an extension of thirty days, or until and including the 25th day of March, A. D. 1930, in which to file his bill of exceptions, transcript of the record, and to docket the case in the United States Circuit Court of Appeals for the 7th circuit.

H. J. BANDY
*Attorney for Defendant.*

Endorsed: Filed February 26, 1930 S. T. Burnett, Clerk.

85 * * (Caption) * * Entered Fe 1930.

## ORDER FOR EXTENSION OF TIME.

Harry Blockburger, above named defendant, having asked for an extension of time in which to file his bill of exceptions, transcript of the record and in which to docket the above entitled case in the United States Circuit Court of Appeals, it is hereby ordered, adjudged and decreed that the said defendant may have thirty additional days to and including the 25th day of March, A. D. 1930, in which to file his said bill of exceptions, transcript of the record and to docket his case in the said United States Circuit Court of Appeals.

Dated this 26th day of February, A. D. 1930.

FITZHENRY
*United States Judge*

Endorsed: Filed Feby. 26, 1930 S. T. Burnett, Clerk.

And afterwards, to wit: on the 25th day of March A. D. 1930, the following further proceedings were had in said court in said case and were entered of record, to wit: Filed Mar 1930.

86 * * (Caption) * *

## APPLICATION FOR EXTENSION OF TIME.

Now comes Harry Blockburger, above named defendant, by Keefe, Bandy, and Listeman, his attorneys, and respectfully asks this honorable court to grant an extension of ten days, or until and including the 4th day of April, A. D. 1930, in which to file his Bill of Exceptions, and transcript of the record and docket this cause in the United States Circuit Court of Appeals for the 7th Circuit.

KEEFE, BANDY & LISTEMAN

Endorsed: Filed March 25, 1930 S. T. Burnett, Clerk.

Mar. 25, 87 * * (Caption) * *

ORDER.

Harry Blockburger, the above named defendant, having petitioned for extension of time in which to file his Bill of Exceptions, Transcript of the Record, and to docket this cause upon appeal in the United States Circuit Court of Appeals for the 7th Circuit, and the court being now fully advised in the premises, it is ordered and adjudged that defendant be granted an extension of time until and including the 4th day of April, A. D. 1930, in which to file his Bill of Exceptions, Transcript of the Record, and to dockst this cause upon appeal in the United Ctates Circuit Court of Appeals for the 7th Circuit.

Dated this 25th day of March, A. D. 1930.

LOUIS FITZHENRY.
*Judge of the U. S. District Court for the Southern District of Ill.*

Endorsed: Filed March 25, 1930 S. T. Burnett, Clerk.

Apr. 4, 88 And afterwards, to wit: on the 4th day of April A. D. 1930, the following further proceedings were had in said court in said case and were entered of record, to wit:

89 * * (Caption) * *

PETITION FOR EXTENSION OF TIME.

Now comes Harry Blockburger, the above named appellant, by H. J. Bandy, his attorney, and respectfully petitions this Honorable Court for an extension of thirty days from the 4th day of April, A. D. 1930, in which to file his bill of exceptions and record in the above entitled cause, and in which to docket the appeal of the above entitled cause in the United States Circuit Court of Appeals, for the Seventh Circuit.

Dated this 4th day of April, A. D. 1930.

H. J. BANDY
*Attorney for Appellant.*

Entered A
1930.

90 * * (Caption) * *

## ORDER FOR EXTENSION OF TIME.

Harry Blockburger, the above named appellant, having petitioned this Honorable Court for an extension of time within which to file his bill of exceptions, and the record, in the above entitled cause, and to docket the appeal of the above-entitled cause in the United States Circuit Court of Appeals, for the Seventh Circuit, and the Court being now fully advised in the premises, it is ordered, adjudged and decreed that the appellant, Harry Blockburger, be granted an additional thirty days from the 4th day of April, A. D. 1930, or until and including the 3rd day of May, A. D. 1930, in which to file his bill of exceptions, and the Clerk's Record, and to docket the appeal of the above entitled cause in the United States Circuit Court of Appeals, for the Seventh Circuit.

Dated this 4th day of April, A. D. 1930.

LOUIS FITZHENRY
*Judge of the United States Court For the Southern District of Illinois.*

Endorsed: Filed April 4, 1930 S. T. Burnett, Clerk.

Filed Ma
1930.

And afterwards, to wit: on the 3rd day of May A. D. 1930, the following further proceedings were had in said court in said case and were entered of record, to wit:

91 * * (Caption) * *

## PETITION FOR EXTENSION OF TIME.

Now comes Harry Blockburger, the above named appellant, by H. J. Bandy, his attorney, and respectfully petitions this Honorable Court for an extension of ten days from the 4th day of May, A. D. 1930, in which to file his bill of exceptions and record in the above entitled cause, and in which to docket the appeal of the above entitled cause in the United States Circuit Court of Appeals, for the Seventh Circuit. As reasons in support of this application, this appellant states that the work of transcribing the bill of exceptions has not yet been completed, and sufficient time will not remain in which

to abstract the bill of exceptions within the time allowed by the order of Court.

Dated this second day of May, A. D. 1930.

H. J. BANDY,
*Attorney for Appellant.*

Endorsed: Filed May 3, 1930 S. T. Burnett Clerk.

92 * * (Caption) * * *

ORDER FOR EXTENSION OF TIME.

Harry Blockburger, the above named appellant, having petitioned this Honorable Court for an extension of time within which to file his bill of exceptions, and the record, in the above entitled cause, and to docket the appeal of the above entitled cause in the United States Circuit Court of Appeals, for the Seventh Circuit, and the Court being now fully advised in the premises, it is ordered, adjudged and decreed that the appellant, Harry Blockburger, be granted an additional thirty days from the 4th day of May, A. D. 1930, or until and including the 3rd day of June, A. D. 1930, in which to file his bill of exceptions and the Clerk's Record, and to docket the appeal of the above entitled cause in the United States Circuit Court of Appeals, for the Seventh Circuit.

Dated this second day of May, A. D. 1930.

.....

*Judge of the United States Court for the Southern District of Illinois.*
SAMUEL ALSCHULER
*Judge.*

O. K.
By WALTER M. PROVINE
*U. S. Atty.*
JAMES T. DILLIE
*Asst. U. S. Atty.*

Endorsed: Filed May 2, 1930 S. T. Burnett Clerk.

(Endorsed:) In the District Court of the United States for the Southern District of Illinois, Southern Division. United States of America, Appellee, vs. Harry Blockburger, Appellant. Petition and Order for Extension of Time. H. J. Bandy, Attorney for Appellant.

93 And afterwards, to wit: on the 8th day of January, A. D. 1930, there was filed in the office of the clerk of said court, a certain Praecipe for Record, which said Praecipe for Record was and is in the words and figures, following, to wit: Fil 1

94 * * (Caption) * *

To Honorable S. T. Burnett, Clerk of the United States District Court for the Southern District of Illinois:

You are hereby requested to prepare and file, in the United States Circuit Court of Appeals for the Seventh Circuit, on behalf of Harry Blockburger, above named appellant, a transcript of the record and proceedings in the above entitled cause, wherein the United States of America was plaintiff, and Harry Blockburger was defendant, said transcript of the record to contain a copy of all of the records in said cause on file in your office, and particularly the following:

1. Placita.
2. Indictment.
3. Plea of not guilty.
4. Proceedings of trial.
5. All orders of Court not specifically enumerated herein.
6. Verdict of jury and exceptions thereto.

95 7. Judgment and sentence.

8. Notice of appeal, with assignment of errors attached.
9. Order granting appeal and fixing time for filing bill of exceptions.
10. All orders granting extensions of time for filing bill of exceptions, or for filing transcripts of record, and docketing said cause in United States Circuit Court of Appeals.
11. Citation to United States District Attorney, with service thereon.
12. Bill of exceptions, and approval thereof by the court.
13. Praecipe for record.
14. Clerk's certificate.

H. J. Bandy
*Attorney for Appellant.*

Endorsed: Filed Jan. 8, 1930, S. T. Burnett, Clerk.

(Endorsed:) * * (Caption) * * Filed Jan 8 1930 at .....o'clock .....M. S. T. Burnett, Clerk H. J. Bandy, Attorney for Appellant.

97 United States of America
Southern District of Illinois } ss.
Southern Division

I, S. T. Burnett, Clerk of the District Court of the United States for the Southern District of Illinois and keeper of the records and seals thereof, do hereby certify the foregoing to be a true and complete transcript of the proceedings had of record and on file in the case entitled The United States —vs— Harry Blockburger, alias Harry Blackburger, Alias Harry Lang, No. 1479, (made in accordance with praecipe for record filed therein) as fully as the same appear from the original files and records thereof now in my office remaining.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Springfield, in said District, this 19th day of May, A. D. 1930.

S. T. BURNETT,
*Clerk.*

(Seal)

96 United States of America, } ss.

The President of the United States, To United States of America, Walter M. Provine, United States Attorney for the Southern District of Illinois, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago within thirty days from the date hereof, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of Illinois, Southern Division, wherein Harry Harry Blockburger, is appellant and you are appellee, to show cause, if any thereby, why the judgment & sentence rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Louis FitzHenry, Judge of the District Court of the United States, this 19th day of October, in the year of our Lord one thousand nine hundred and twenty-nine.

LOUIS FITZHENRY,
*U. S. District Judge for the Southern District of Illinois.*

Service of the foregoing Citation and receipt of a copy thereof is admitted this 19th day of October, A. D. 1929.

WALTER M. PROVINE
*U. S. Attorney.*

(Endorsed:) * * Caption * * Citation and service Returnable November 18, 1929 S. T. Burnett, Clerk. Filed October 19th, 1929. S. T. Burnett, Clerk.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United States Court Room in the City of Chicago in said Seventh Circuit on the first day of October, 1929, of the October Term in the year of our Lord one thousand nine hundred and twenty-nine, and of our Independence the one hundred and fifty-fourth.

And afterwards, to wit, on the sixth day of June, 1930, there was filed in the office of the clerk of this Court an appearance of counsel for Appellees, which said appearance is in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1929

No. 4389

HARRY BLOCKBURGER, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

The Clerk will enter my appearance as counsel for the Appellee.

Walter M. Provine, United States Attorney, Federal Building, Springfield, Illinois.

Endorsed: Filed June 6, 1930. Edward M. Holloway, Clerk.

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And afterwards, to wit, on the twelfth day of June, 1930, there was filed in the office of the clerk of this Court an appearance of counsel for Appellant, which said appearance is in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1929

No. 4389

HARRY BLOCKBURGER, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

The Clerk will enter my appearance as counsel for the Appellant.

Harold J. Bandy, Hodge Bldg., Granite City, Ill.

Endorsed: Filed June 12, 1931. Edward M. Holloway, Clerk.

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At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United States Court Room in the City of Chicago in said Seventh Circuit on the seventh day of October, 1930, of the October Term in the year of our Lord one thousand nine hundred and thirty, and of our Independence the one hundred and fifty-fifth.

And afterwards, to wit, on the second day of April, 1931, the following further proceedings were had and entered of record, to wit:

Thursday, April 2, 1931.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present: Hon. Samuel Alschuler, Circuit Judge, presiding; Hon. William M. Sparks, Circuit Judge; Edward M. Holloway, Clerk; Henry C. W. Laubenheimer, Marshal.

4389

HARRY BLOCKBURGER

vs.

UNITED STATES OF AMERICA

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division

It is now here ordered that this cause be, and the same is hereby set down for hearing on Thursday, April 16, 1931.

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And afterwards, to wit, on the sixteenth day of April, 1931, the following further proceedings were had and entered of record, to wit:

Thursday, April 16, 1931.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present: Hon. Samuel Alschuler, Circuit Judge, presiding; Hon. Evan A. Evans, Circuit Judge; Hon. William M. Sparks, Circuit Judge; Edward M. Holloway, Clerk; Henry C. W. Laubenheimer, Marshal.

4389

HARRY BLOCKBURGER

vs.

UNITED STATES OF AMERICA

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. Harold J. Bandy, counsel for appellant, and by Mr. Marks Alexander, counsel for appellee, and the Court having heard the same, takes this matter under advisement.

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And afterwards, to wit, on the eleventh day of June, 1931, there was filed in the office of the clerk of this Court, the opinion of the Court, which said Opinion is in the words and figures following, to wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1930, APRIL SESSION, 1931

No. 4389

HARRY BLOCKBURGER, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division

June 11, 1931

Before Alschuler, Evans, and Sparks, Circuit Judges

SPARKS, Circuit Judge:

Appellant was charged by indictment with having violated what is commonly known as the Harrison Narcotic

Act of 1914, as amended, and also what is commonly known as the Narcotic Drugs Import and Export Act of 1909, as amended. The indictment was in five counts. The first count alleged a sale to Ella Rush on May 27, 1929, of two grains of morphine hydrochloride not in or from an original stamped package. The second count alleged a sale to the same party, on May 28, 1929, of ten grains of the same drug not in or from an original stamped package. The third count alleged a sale to the same party, on May 29, 1929, of eight grains of the same drug not in or from an original stamped package. The fourth count charges appellant with having knowingly received, bought, sold, and facilitated the transportation, concealment and sale, on May 31, 1929, of twenty grains of the same drug, which had been fraudulently imported into the United States. The fifth count alleges a sale to Ella Rush, on May 29, 1929, of ten grains of the same drug, which sale was not in pursuance of a written order of Ella Rush upon a blank form issued for that purpose by the Commissioner of Internal Revenue.

The first, second, and third counts were based upon par. 703, 44 Stat. 96; the fourth count was based on the Act of 1909, par. 2, 35 Stat. 614, as amended in 1914, 1922, and 1924. The fifth count was based on par. 2, 38 Stat. 786. The jury returned a verdict of guilty as to counts two, three and five, and not guilty as to counts one and four. The court assessed a punishment on each of the second, third, and fifth counts of five years' imprisonment and a fine of $2,000, the terms of imprisonment to run consecutively.

It is appellant's contention that the sentence imposed is excessive, unreasonable, and for a longer period of imprisonment and a greater fine than the maximum fixed by law; that the facts proved under counts two, three, and five establish, if anything, but one offense, and that he cannot legally be held guilty of separate offenses; that the maximum punishment for any single violation of the statute in controversy is a fine of $2,000 and imprisonment for five years.

Par. 703, 44 Stat. 96, provides that it shall be unlawful for any person to sell opium or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof, except in the original stamped package or from

the original stamped package. Counts one and two are drawn under this section. They charge two separate sales, on different days but to the same party, and the evidence supports the charges. There is nothing in the statute to indicate that Congress intended that such a state of facts should be considered as a continuing offense, or that such an offender should suffer but one penalty, or that the aggregate penalties should not exceed the maximum penalty provided for a separate offense. The offenses charged and proved are as separate and distinct as if appellant had sold the drug to different parties on the dates mentioned.

The sale referred to in the third count is the same sale upon which the fifth count is based, but the circumstances under which the sale was made were such as to render the sale illegal for two different reasons, as set forth in and as violative of two separate statutes. In other words, in making one sale appellant violated two separate sections of the law, one of which required the sale to be made in or from the original stamped package, upon which section count three is based, and another section which required the sale to be made in pursuance of a written order of the purchaser upon a blank form issued for that purpose by the Commissioner of Internal Revenue, upon which section the fifth count is based. It cannot be said that the evidence necessary to establish the truth of either of the two counts in controversy would establish the other count, for indeed the opposite is true.

The test of identity of offenses is whether the same evidence is required to sustain them; if not, then the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined by statute. Morgan v. Devine, 237 U. S. 632.

That distinct violations of law growing out of the same transaction constitute distinct offenses is fully supported by Burton v. United States, 202 U. S. 344, Gavieres v. United States, 220 U. S. 338, Ebeling v. Morgan, 237 U. S. 625, Braden v. United States, 270 Fed. 441, and Roark v. United States, 17 F. (2d) 570. "There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction." Albrecht v. United States, 273 U. S. 1.

In this case the court imposed upon appellant separate punishments (a) for sale of morphine which was not in the original stamped package or from the original stamped package, (b) for selling on another day morphine not in the original stamped package, and (c) for selling morphine without a written order from the purchaser and without using a form for such order issued by the Commissioner of Internal Revenue.

Our attention has been called to the case of Ballerini v. Aderholt, 44 F. (2d) 352, wherein appellant was charged in one count of the indictment with having sold a narcotic without being registered and without having paid the special tax provided by law; and in the second count with having made the sale without requiring from the purchaser a written order. Upon his plea of guilty the District Court sentenced him on both counts and ordered that the sentences run consecutively. The Circuit Court of Appeals of the Fifth Circuit reversed the District Court and held that there was but one offense, and in so doing it used the following language: "At last it was the sale, and not the failure to register, pay the tax, or secure the written order, that constituted the offense." This we cannot accept as a proper construction of the statute, nor of the Supreme Court decisions, supra. Neither the sale, the failure to register, pay the tax, or secure the written order, in and of itself constitutes a crime; but the sale in conjunction with either the failure to register, pay the tax, or secure the written order does constitute a separate crime as we interpret the statute, and as we think the Supreme Court has interpreted it.

Whether the sentence imposed is unduly severe we are not in position to say accurately. Circumstances not disclosed by the record may justify it, and we cannot disturb the judgment on this account. United States v. Daugherty, 269 U. S. 360.

In instructing the jury upon the competency and credibility of appellant as a witness, the court said:

"There was a rule at one time that one who had been convicted of a felony was an incompetent witness. That is not the rule now, but he is a competent witness and the jury has a right to take the fact of a former conviction into consideration in determining the degree of credibility they

will accord to him as a witness, and, if you believe him, to act upon his testimony."

Appellant insists that the court erred in instructing the jury as to what was formerly the law. There was no prejudicial error in this, and if there had been the court cured it by withdrawing that part of the instruction from the jury.

Appellant contends that the court erred in permitting the District Attorney, in cross-examination, to ask witness George Blockburger if he had not signed a bond of William Bapple, who is under indictment in this court, charged with violating the Harrison Narcotic Law; and that the court further erred in permitting the District Attorney, in cross-examination, to ask appellant if he did not know and associate with William Bapple, with one Walker, and with one Hemstrett, known as Lion Tamer. The court did not abuse its discretion in permitting these questions to be asked and answered, as affecting the credibility of such witnesses.

The question put to George Blockburger was proper for another reason. He had testified that his business was that of real estate broker, and the cross-examination showed that a part of his business was that of going on bonds in criminal cases—not only for Bapple, but for other people. In this respect it related to his direct testimony and was proper.

Appellant further contends that reversible error was committed by the District Attorney in his argument to the jury to the effect that most narcotic addicts are pickpockets. This statement was immediately withdrawn by the District Attorney, and the court admonished the jury that no one was on trial for being a pickpocket. If there was any error in this remark it was cured.

The District Attorney further stated to the jury that "I am an officer of the Government and the Court is an officer of the Government, and we know Ella Rush." Appellant insists that this was error. While the remark was unnecessary, we fail to understand how it could have prejudiced appellant, and the court instructed the jury to disregard it.

We find no error in the record, and the judgment is affirmed.

ALSCHULER, Circuit Judge, dissenting:

The imposition under three counts of one indictment of an aggregate penalty of fifteen years' imprisonment and $6,000 fine, where the maximum penalty for the crime denounced by the statute is five years' imprisonment and $2,000 fine, suggests careful search of the record to see whether such triple maximum is sustainable.

In United States v. Daugherty, 269 U. S. 360, where, as here, there was imposed a penalty of five years' imprisonment under each of three counts charging violation of the Anti-Narcotic Act, it was held that the Court of Appeals was right in denying the contention that the indictment charged but a single crime. From the opinion of the Court of Appeals therein (2 F. (2d) 691) it appears that the first count charged a sale January 4, 1923, to Elmer; the second, January 10 to Entriken; and the third, January 17 to Ellison. The Supreme Court held unsound the contention that each sale proceeded from the same criminal intent and was therefore but a single crime, "because criminal intent is not an element of the crime, and because each count charges a different sale to a different person and on a different day, and if the sales were made as charged they constituted three separate offenses."

But here, accepting at par the evidence for the Government, it seems to me but a single crime appears. Witness Ella Rush, herself an addict, was the keystone of the Government's case. She had been regularly employed by a Federal narcotic agent as a decoy to ferret out persons who were unlawfully selling narcotics. She reported for duty at Springfield and sought out a woman named Walker (a co-defendant), representing that she wished to buy morphine. On the night of May 27, 1929, Walker brought appellant to Rush, who, after various pretenses concerning herself, gave appellant two dollars, requesting him to get her some morphine. He went out and returning a little later brought her the morphine. At the same time she gave him eight dollars more, requesting him to bring her more of the drug. In a few hours he again returned with about ten grains more; and a little later the same day she gave him ten dollars for more morphine, which he brought her the day following. She asked him for more, but he evidently had become suspicious and did not bring it,

whereupon he was arrested. She also paid Walker ten dollars for introducing her to appellant, all the funds being supplied by the narcotic agent.

The situation here is decidedly different from that in the Daugherty case, where the sales were to different persons, and separated by intervals of several days. Here the transactions were between the same parties, and in pursuance of the same definite purpose and plan of the narcotic agent to have this person detected and taken in the act of violating the law. The transactions between appellant and Rush, which are alone the foundation of the charge, show a sort of "continuous performance," Rush supplying him with the Government's money, and employing each delivery of the drug as an immediate leverage for inducing him to procure more of the same. There was substantially no interval of time between the receiving of one and the advancing of the money for the next installment.

I do not question the propriety, in proper cases such as this, of resorting to such means for detecting and punishing crime; but if in the detecting process the Government sees fit to make an installment affair of it, I do not think the Government is in position to say that each installment of such a general operation constitutes a separate crime. The agent conducted the affair with an unbroken continuity, with the motive and plan of adducing proof that this man could and would and did unlawfully procure and sell and deliver narcotic drugs. It was essentially more a buying than a selling transaction. The Government procured it to be done. The sectional nature of the transaction was a device of the agent, not of appellant, who would no doubt have been quite as willing to sell the entire quantity at once instead of on the Federal agent's "installment plan."

Upon the count which involved the two dollar sale appellant was acquitted by the jury. Of the three counts on which he was convicted, counts three and five involved the very same transaction, count three charging that the morphine sold was not in nor from the original stamped package, and count five that the sale was not made in pursuance of a written order of Ella Rush and upon a form issued in blank for that purpose by the Commissioner of Internal Revenue. The incriminating acts of appellant under each of these counts are precisely the same—the

same sale of the same drug, and all pursuant to the same scheme of having appellant caught in the act of selling the drug which appellee's agent was to buy.

That the "bootlegging" of narcotics is a most reprehensible and dastardly business should have no bearing on whether a single unlawful sale may be twice punished—once because the purchaser supplied no written order, and again because there was no stamp on the package.

I do not think the penalty section of the statute contemplates such double punishment for the same transaction. Sec. 705, Title 26, U. S. C., provides:

"Any person who violates or fails to comply with any of the requirements of sections 211 and 691 to 707 of this title shall, on conviction, be fined not more than $2,000 or be imprisoned not more than five years, or both, in the discretion of the court."

It seems to me this wording implies that any act whereby any one or more of the requirements of the enumerated sections is violated shall subject the offender to the singular penalty which the quoted section specifies. Appellant's one act of selling ten grains of morphine subjected him to the prescribed penalty if in the sale he violated or failed to comply with "any of the requirements"—whether one or more. The unlawful sale is the essential thing, not the particular reason or reasons because of which the sale is unlawful. If the seller in making it complies with all the statutory requirements he commits no crime; if he fails to comply with all or any of these requirements a crime is committed, for which the penalty fixed in section 705 may be imposed; but to my mind not a cumulative series of such penalties, each predicated on a different one of the quite numerous requirements of the specified sections.

The quoted sentence, from Albrecht v. United States, 273 U. S. 1, is not in my judgment applicable to these facts. There the court held that possessing and selling intoxicating liquors are separate offenses each separately punishable, or, if considered separate steps of a single offense, may be separately penalized without constitutional transgression. There the defendant possessed and he sold, and it was reasoned he might have done either without having done the other. Here he only sold—a criminal act only if

any one or more of the statutory requisities for a lawful sale were absent.

The Fifth Circuit Court of Appeals recently considered the identical question in Ballerini v. Aderholt, Warden, 44 F. (2d) 352, reaching the conclusion that two penalties may not be predicated on a single sale of narcotics. The court overruled its prior decision to the contrary (by the same judge and the same judges sitting) announced in Vamvas v. United States, 13 F. (2d) 347. It is to be hoped that this conflict in decisions of the United States Courts of Appeals for the Fifth and Seventh Circuits may be authoritatively resolved.

I believe that this one "continuous performance," initiated and enacted under the "personal direction" of the Government narcotic agent, and financed by the Government, represents but a single infraction of the law by appellant, and should have been so treated in sentencing him. But I think that in any event the infliction of consecutive and cumulative penalties under each of counts three and five was unwarranted and erroneous.

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And on the same day, to wit, on the eleventh day of June, 1931, the following further proceedings were had and entered of record, to wit:

Thursday, June 11, 1931.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present: Hon. Samuel Alschuler, Circuit Judge, presiding; Hon. Evan A. Evans, Circuit Judge; Hon. William M. Sparks, Circuit Judge; Edward M. Holloway, Clerk; Henry C. W. Laubenheimer, Marshal.

4389

HARRY BLOCKBURGER

vs.

UNITED STATES OF AMERICA

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division

This cause came on to be heard on the transcript of the record from the District Court of the United States for

the Southern District of Illinois, Southern Division, and was argued by counsel.

On consideration whereof: It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from 1 to 11, inclusive, contain a true copy of the proceedings had and papers filed (except the briefs of counsel and motions and orders relating to filing of briefs) in the case of Harry Blockburger, Appellant, vs. United States of America, Appellee, No. 4389, October Term, 1930, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this Fifth day of August A. D. 1931.

Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.
(Seal United States Circuit Court of Appeals, Seventh Circuit.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 2, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted, and the case is advanced and assigned for argument on Monday, November 23rd after the case heretofore assigned for that day.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.